

Nov 06, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KYLE C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-3167-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 16. Attorney D. James Tree represents Kyle C. (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On June 19, 2013, Plaintiff filed an application for a period of disability and Disability Insurance Benefits, alleging disability since July 26, 2013, due to chronic pancreatitis. Tr. 160, 253. Plaintiff's application was denied initially and upon reconsideration.

Administrative Law Judge (ALJ) Virginia M. Robinson held a hearing on August 6, 2015, Tr. 36-83, and issued an unfavorable decision on June 29, 2016, Tr. 20-30. The Appeals Council denied review on July 31, 2017. Tr. 1-5. The

1 ALJ's June 2016 decision thus became the final decision of the Commissioner,
2 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
3 filed this action for judicial review on September 29, 2017. ECF No. 1.

4 **STATEMENT OF FACTS**

5 The facts of the case are set forth in the administrative hearing transcript, the
6 ALJ's decision, and the briefs of the parties. They are only briefly summarized
7 here.

8 Plaintiff was born on December 25, 1980, and was 32 years old on the
9 disability application date, June 19, 2013. Tr. 160. He completed high school in
10 1999. Tr. 254. Plaintiff's disability report indicates he stopped working because
11 of his condition(s) on August 30, 2013. Tr. 253. At the administrative hearing,
12 Plaintiff testified he had, however, continued to work small odd jobs for cash. Tr.
13 70-71. These jobs were in metal fabrication, which involved cutting and welding
14 parts, grinding, sweeping, and picking up scrap metal and garbage, and mechanical
15 work on a race truck. Tr. 70-71.

16 Plaintiff applied for and received unemployment benefits from September
17 2013 to February 2014. Tr. 48. He testified he reported each week during that
18 time period that he was ready, able and willing to work and was actively looking
19 for work. Tr. 49. He applied for mechanic jobs but had failed pre-employment
20 drug screens for any potential positions. Tr. 48-49.

21 Plaintiff stated he first used marijuana recreationally at age 15 and stopped
22 at age 18. Tr. 47. He then began using marijuana for medical purposes in 2011 or
23 2012. Tr. 48. He indicated the first thing he does every morning is smoke
24 marijuana, Tr. 60, and he currently will use a half ounce of marijuana per week, on
25 average, to alleviate his pain, Tr. 47.

26 Plaintiff stated he began to experience stomach pain in November of 2010,
27 but the pain did not interfere with his ability to work until 2011. Tr. 53. He
28 described an episode of stomach pain as extreme pain in his right, mid-abdominal

1 area that resulted in nausea, diarrhea, chills and hot flashes. Tr. 56. When he
2 experiences an episode of stomach pain, it can cause him to drop to the ground and
3 ball up in the fetal position. Tr. 53-55. If he is unable to control his stomach pain
4 by lying down and taking his medications, he will go to the emergency room to
5 receive additional pain medication. Tr. 56-57.

6 Plaintiff testified the pain has progressively gotten worse and the flare ups
7 occur more frequently. Tr. 54. He indicated he now has pain every day. Tr. 57.
8 However, Plaintiff did state he does “pretty well” if he sticks to a low to non-fat
9 diet, and his pain level is also helped by using medical marijuana and taking
10 Viokase enzyme pills. Tr. 55, 66.

11 **STANDARD OF REVIEW**

12 The ALJ is responsible for determining credibility, resolving conflicts in
13 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
14 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*, with
15 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
16 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
17 only if it is not supported by substantial evidence or if it is based on legal error.
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
19 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
20 1098. Put another way, substantial evidence is such relevant evidence as a
21 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
22 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
23 rational interpretation, the Court may not substitute its judgment for that of the
24 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
25 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
26 administrative findings, or if conflicting evidence supports a finding of either
27 disability or non-disability, the ALJ’s determination is conclusive. *Sprague v.*
28 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision

1 supported by substantial evidence will be set aside if the proper legal standards
2 were not applied in weighing the evidence and making the decision. *Browner v.*
3 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

4 **SEQUENTIAL EVALUATION PROCESS**

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
7 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
8 four, the burden of proof rests upon the claimant to establish a prima facie case of
9 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
10 met once a claimant establishes that a physical or mental impairment prevents the
11 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
12 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
13 to step five, and the burden shifts to the Commissioner to show that the claimant
14 can perform other jobs present in significant numbers in the national economy.
15 *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).
16 If a claimant cannot make an adjustment to other work in the national economy, a
17 finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

18 **ADMINISTRATIVE DECISION**

19 On June 29, 2016, the ALJ issued a decision finding Plaintiff was not
20 disabled as defined in the Social Security Act.

21 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
22 activity since the alleged onset date. Tr. 22.

23 At step two, the ALJ determined Plaintiff had the following severe
24 impairment: gastrointestinal disorder/pain disorder associated with psychological
25 and physical factors. Tr. 23.

26 At step three, the ALJ found Plaintiff did not have an impairment or
27 combination of impairments that meets or medically equals the severity of one of
28 the listed impairments. Tr. 24.

1 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and
2 determined he could perform light exertion level work with the following
3 limitations: he could lift or carry up to 20 pounds occasionally and up to 10
4 pounds frequently; he could stand or walk for approximately six hours and sit for
5 approximately six hours per eight-hour work day with normal breaks; he could
6 frequently climb ramps, stairs, ladders, ropes or scaffolds; he could frequently
7 stoop, crouch and crawl; and he must avoid workplace hazards such as dangerous
8 machinery or working at unprotected heights. Tr. 24.

9 At step four, the ALJ determined Plaintiff was not able to perform any of his
10 past relevant work. Tr. 28-29.

11 At step five, the ALJ determined that based on the testimony of the
12 vocational expert, and considering Plaintiff's age, education, work experience and
13 RFC, Plaintiff could perform other jobs present in significant numbers in the
14 national economy, including the jobs of Cashier II; Assembler, Production; and
15 Cleaner, Hospital. Tr. 29-30. The ALJ thus concluded Plaintiff was not under a
16 disability within the meaning of the Social Security Act at any time from June 19,
17 2013, through the date of the ALJ's decision, June 29, 2016. Tr. 30.

18 ISSUES

19 The question presented is whether substantial evidence supports the ALJ's
20 decision denying benefits and, if so, whether that decision is based on proper legal
21 standards.

22 Plaintiff contends the ALJ erred in this case by (1) failing to properly assess
23 the medical evidence from Leslie Schneider, Ph.D., and Thomas B. Curtis, M.D.;
24 (2) failing to find Plaintiff's chronic pancreatitis was a severe, medically-
25 determinable impairment; (3) failing to properly assess whether Plaintiff was
26 disabled under Listing 5.06; and (4) improperly discrediting Plaintiff without a
27 specific, clear and convincing reason to do so. ECF No. 12 at 3-4.

28 ///

1 **DISCUSSION¹**

2 **A. Step Two**

3 Plaintiff contends the ALJ erred at step two by failing to find Plaintiff's
4 chronic pancreatitis was a severe, medically-determinable impairment.

5 Plaintiff has the burden of proving he has a severe impairment at step two of
6 the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §
7 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical
8 and other evidence that shows he has a severe impairment. 20 C.F.R. §
9 416.912(a). Step two is "a de minimis screening device [used] to dispose of
10 groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an
11 ALJ may find that a claimant lacks a medically severe impairment or combination
12 of impairments only when this conclusion is "clearly established by medical
13 evidence." S.S.R. 85-28; *see Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
14 2005). Applying the normal standard of review to the requirements of step two,
15 the Court must determine whether the ALJ had substantial evidence to find that the
16 medical evidence clearly established that Plaintiff did not have a severe
17 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) ("Despite the
18 deference usually accorded to the Secretary's application of regulations, numerous
19 appellate courts have imposed a narrow construction upon the severity regulation
20 applied here."); *Webb*, 433 F.3d at 687.

21
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 In this case, the ALJ concluded Plaintiff had the severe impairment of
2 gastrointestinal disorder/pain disorder associated with psychological and physical
3 factors. Tr. 23. The ALJ noted the comments of reviewing physician Gordon
4 Hale, M.D., that although Plaintiff complained of sudden, severe abdominal pain
5 throughout the record, “there is very little objective evidence of acute illness or
6 specific etiology.” Tr. 27-28. The ALJ did not specifically assess chronic
7 pancreatitis as a severe, medically-determinable impairment in this case.

8 Plaintiff provides multiple record citations for his argument that his chronic
9 pancreatitis is a severe, medically determinable impairment. ECF No. 12 at 2, 12.
10 However, an examination of the citations provided by Plaintiff does not fully
11 support this assertion. *See* Tr. 346-347 (March 13, 2013 notation by Gilbert Ong,
12 M.D., that “Pancreatic EUS shows no definitive chronic pancreatitis.”); Tr. 360
13 (April 11, 2013 assessment by Bryan Wernick, M.D., of questionable abdominal
14 wall pain and questionable history of chronic pancreatitis); Tr. 374-375 (July 4,
15 2013 Yakima Valley Memorial Hospital report diagnosing only “abdominal pain”);
16 Tr. 393 (December 17, 2012 report of Shayan Irani, M.D., noting the results of
17 examination “could represent mild chronic pancreatitis, or could just be a normal
18 variation.”); Tr. 395 (August 19, 2013 report of Dr. Irani assessing only “mild
19 maybe early chronic pancreatitis.”); Tr. 402 (July 15, 2013 assessment of Dr. Irani
20 of “chronic abdominal pain with fluctuating pattern to it He has had episodes
21 of elevated lipases but no documented episodes of acute pancreatitis. Endoscopic
22 ultrasound demonstrated some nonspecific findings, which certainly could
23 represent mild early chronic pancreatitis, but no definitive evidence for the
24 same.”);² Tr. 421 (August 24, 2013 Yakima Valley Memorial Hospital report
25

26 ²The foregoing reports of Dr. Irani, Tr. 393, 395, 402, contradict Dr. Irani’s
27 June 17, 2015 letter, also cited by Plaintiff, which states Dr. Irani had treated
28 Plaintiff from August 2012 to October 2014 for chronic pancreatitis, Tr. 544.

1 diagnosing Chronic Pain); Tr. 435 (June 12, 2013 Yakima Valley Memorial
2 Hospital report diagnosing Abdominal Pain, Unspecified); Tr. 452-453, 456-458,
3 464-466, 468-469 (April, 5, 2013, June 18, 2013, and July 29, 2013 reports of
4 Craig Whittlesey, M.D., diagnosing only “Abdominal Pain, Unspecified Site”
5 following initial diagnosis (January 10, 2013) of chronic pancreatitis); Tr. 481-483
6 (April 28, 2014 diagnosis by Henry Y. Kim, M.D., of chronic abdominal pain,
7 probable abdominal wall pain, and “questionable history of chronic pancreatitis.”);
8 and Tr. 511-513, 516-520, 529-531 (July 8, 2015, June 11, 2015, and August 27,
9 2014 Yakima Valley Memorial Hospital reports diagnosing only abdominal pain).

10 Although chronic pancreatitis has been mentioned in the record, there is no
11 evidence clearly establishing Plaintiff suffered from chronic pancreatitis. *See*
12 *Webb*, 433 F.3d at 686-687. Even if the Court determined the ALJ erred in failing
13 to find Plaintiff’s chronic pancreatitis was a separate severe impairment, the record
14 does not indicate Plaintiff had unique functional limitations from “chronic
15 pancreatitis” as distinct from the limitations caused by the severe gastrointestinal
16 disorder/pain disorder found by the ALJ in this case. Accordingly, any error in this
17 regard would be harmless. *See Johnson v. Shalala*, 60 F.3d 1428, 1436 n. 9 (9th
18 Cir. 1995) (an error is harmless when the correction of that error would not alter
19 the result); *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (an ALJ’s
20 decision will not be reversed for errors that are harmless).

21 **B. Listing 5.06**

22 Plaintiff further contends the ALJ erred at step three of the sequential
23 evaluation process by failing to properly assess whether Plaintiff was disabled
24 under Listing 5.06. ECF No. 12 at 13-15.

25 The Listings describe, for each of the major body systems, impairments that
26 are severe enough to prevent an individual from doing any gainful activity,
27 regardless of age, education, or work experience. 20 C.F.R. § 416.925(a). Each
28 Listing specifies the objective medical and other findings needed to satisfy the

1 criteria of that Listing. A diagnosis alone is insufficient; a medically-determinable
2 impairment must also satisfy all of the criteria of the Listing, 20 C.F.R. §
3 416.925(d), and Plaintiff bears the burden of establishing that an impairment
4 satisfies the requirements of a Listings impairment, *Tackett*, 180 F.3d at 1098-
5 1099; 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). A generalized assertion of
6 functional problems is not enough to establish disability at step three of the
7 sequential evaluation process. *Tackett*, 180 F.3d at 1100.

8 Plaintiff asserts he equals Listing 5.06. ECF No. 12 at 14. Listing 5.06
9 explains when a claimant with “inflammatory bowel disease” has a condition so
10 serious that it is *per se* disabling. 20 C.F.R. Part 404, Subpt. P, App. 1, § 5.06.
11 The Listing sets forth a number of specific factors, **two of which must be present**
12 within the same consecutive six-month period to qualify for a *per se* disability
13 finding. Among the listed factors are (3) “[c]linically documented tender
14 abdominal mass palpable on physical examination with abdominal pain or
15 cramping that is not completely controlled by prescribed narcotic medication,
16 present on at least two evaluations at least 60 days apart” and (5) an “[i]nvoluntary
17 weight loss of at least 10 percent from baseline . . . present on at least two
18 evaluations at least 60 days apart.” 20 C.F.R. Part 404, Subpt. P, App. 1, §
19 5.06(B). Plaintiff argues the record reflects these two factors were present;
20 therefore, he is disabled under Listing 5.06(B). The Court does not agree.

21 As noted above, a claimant establishes a disability pursuant to Listing 5.06B
22 if at least two of the subsections are satisfied. Even assuming Plaintiff met the
23 requirements of subsection 5,³ Plaintiff has not established that the ALJ erred in
24 finding that none of the other subsections were satisfied.

25
26 ³Plaintiff argues there is evidence in the record showing weight loss of at
27 least 10 percent from baseline. ECF No. 12 at 15. However, Plaintiff fails to
28 adequately establish his baseline weight, demonstrate whether any alleged weight

1 Listing 5.06B(3) is satisfied by the existence of a clinically documented
2 tender abdominal mass palpable on physical examination. Plaintiff concedes he
3 did not have a palpable abdominal mass. ECF No. 12 at 14 (acknowledging
4 Plaintiff “did not have a palpable abdominal mass under a form of inflammatory
5 bowel disease”). This alone defeats Plaintiff’s position, as Listing 5.06B(3)
6 requires such a condition to be “clinically documented.” Nonetheless, Plaintiff
7 points to evidence in the record of Plaintiff’s abdominal pain for which he self-
8 medicated with marijuana because his narcotic medications were reportedly
9 insufficient to control the pain. *Id.* Listing 5.06B(3) is not satisfied by mere
10 abdominal pain and cramping; the existence of a clinically documented tender
11 abdominal mass palpable on examination is necessary. The ALJ did not err in
12 finding Listing 5.06B(3) unsatisfied.

13 Based on the foregoing, even assuming the record adequately reflected that
14 Plaintiff had a 10 percent weight loss from baseline within a consecutive six-month
15 period, Plaintiff’s condition did not medically equal two stated factors as required
16 by the Listing. For this reason, the Court concludes the ALJ did not err at step
17 three of the sequential evaluation process in finding Plaintiff did not meet Listing
18 5.06B. Tr. 24.

19 **C. Medical Opinion Testimony**

20 Plaintiff also asserts the ALJ erred by failing to provide legally sufficient
21 reasons for discounting the examining medical opinions of Leslie Schneider,
22 Ph.D., and Thomas B. Curtis, M.D. ECF No. 12 at 6-14.

23 In a disability proceeding, the courts distinguish among the opinions of three
24 types of acceptable medical sources: treating physicians, physicians who examine
25 _____
26 loss was voluntary or involuntary, or show whether the weight loss occurred within
27 a consecutive six-month period as required by the subsection. It was not error for
28 the ALJ to determine that listing 5.06B(5) was unsatisfied.

1 but do not treat the claimant (examining physicians) and those who neither
2 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
3 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight
4 than an examining physician's opinion, and an examining physician's opinion is
5 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
6 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. In weighing the medical
7 opinion evidence of record, the ALJ must make findings setting forth specific,
8 legitimate reasons for doing so that are based on substantial evidence in the record.
9 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). Moreover, the ALJ is
10 required to set forth the reasoning behind his or her decisions in a way that allows
11 for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)
12 (finding a clear statement of the agency's reasoning is necessary because the Court
13 can affirm the ALJ's decision to deny benefits only on the grounds invoked by the
14 ALJ). "Although the ALJ's analysis need not be extensive, the ALJ must provide
15 some reasoning in order for us to meaningfully determine whether the ALJ's
16 conclusions were supported by substantial evidence." *Treichler v. Comm'r of Soc.*
17 *Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

18 **1. Leslie Schneider, Ph.D.**

19 Dr. Schneider performed a psychological evaluation of Plaintiff on January
20 9, 2014. Tr. 484-490. Dr. Schneider diagnosed a pain disorder associated with
21 psychological and physical factors and indicated a belief that Plaintiff had
22 unpredictable, severe chronic pain issues. Tr. 489. Dr. Schneider encouraged
23 Plaintiff to pursue disability benefits and opined he would qualify. Tr. 489. Dr.
24 Schneider additionally suggested Plaintiff check into Division of Vocational
25 Rehabilitation because "he does want to do some of his own private business
26 things." Tr. 489.

27 The ALJ gave some weight to Dr. Schneider's report, finding Plaintiff had
28 severe impairments which caused limitations in his ability work and prevented him

1 from performing the heavy or very heavy work he had done in the past. Tr. 28.
2 The ALJ agreed with Dr. Schneider's suggestion that Plaintiff contact the Division
3 of Vocational Rehabilitation to explore employment options. Tr. 28. However,
4 the ALJ found Dr. Schneider's opinion that Plaintiff would qualify for disability
5 benefits was not supported by Plaintiff's broad range of activities and the objective
6 medical evidence or record. Tr. 28.

7 Although Dr. Schneider suspected Plaintiff would qualify for disability
8 benefits, Tr. 489, the evaluation report fails to identify specific functional
9 limitations to support this opinion. Instead, Dr. Schneider noted Plaintiff's
10 activities of daily living consisted of such activities as riding horses, riding bulls,
11 fishing, camping, going on drives, dancing and doing things with his children. Tr.
12 488; *see Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (holding that
13 the existence of internal inconsistencies within a physician's opinion constitutes a
14 specific and legitimate reason for the ALJ to reject that physician's opinion
15 concerning the claimant's functional limitations); *Johnson*, 60 F.3d at 1432-1433
16 (holding that the ALJ may disregard a physician's opinion when it is internally
17 inconsistent). Furthermore, Plaintiff testified at the August 2015 administrative
18 hearing that he had continued to work jobs in metal fabrication and doing
19 mechanical work on a race truck, Tr. 70-71, and Plaintiff's disability function
20 report indicates he was able to do all household chores, cleaning, laundry,
21 household repairs, mowing, chopping wood, and feeding and watering of animals,
22 Tr. 276. Tr. 27. As determined by the ALJ, Dr. Schneider's opinion that Plaintiff
23 would qualify for disability benefits was inconsistent with Plaintiff's "wide range
24 of daily activities."

25 Furthermore, the objective medical evidence does not support Dr.
26 Schneider's opinion that Plaintiff would qualify for disability benefits. As stated
27 by the ALJ, Plaintiff consistently has, at most, moderate tenderness on palpation in
28 the upper right abdominal area, which has been reported as managed with diet,

1 prescription medications, pancreatic enzyme replacement therapy and medical
2 marijuana. Tr. 27, 55, 66, 371, 544.

3 Finally, it is the role of the ALJ to determine whether a claimant is
4 “disabled” within the meaning of the Social Security Act, and that determination is
5 based on both medical and vocational components. *Edlund v. Massanari*, 253 F.3d
6 1152, 1156-1157 (9th Cir. 2001). Whether a claimant is “disabled” under the
7 medical and vocational standards of the Social Security Act is a legal
8 determination reserved for the ALJ, not a medical professional. *Harman v. Apfel*,
9 211 F.3d 1172, 1180 (9th Cir. 2000).

10 The Court finds the ALJ’s analysis with respect to Dr. Schneider’s opinions
11 is supported. *See Magallanes*, 881 F.2d at 753 (“It is not necessary to agree with
12 everything an expert witness says in order to hold that his testimony contains
13 ‘substantial evidence.’” (*quoting Russell v. Bowen*, 856 F.2d 81, 83 (9th Cir.
14 1988))). The ALJ’s interpretation was based on substantial evidence, and she
15 supported her findings with specific and legitimate reasoning.

16 **2. Thomas B. Curtis, M.D.**

17 On October 30, 2014, Dr. Curtis examined Plaintiff with respect to his
18 abdominal pain issue. Tr. 477-480. Dr. Curtis diagnosed Plaintiff with chronic
19 abdominal pain and pancreas divisum (a congenital irregularity of the ducts in the
20 pancreas) and reported “[h]e is unable to work.” Tr. 26, 479.

21 The ALJ did not specify the weight accorded to Dr. Curtis’ report. Tr. 26.
22 Nevertheless, the Court notes the conclusory statement in the report that Plaintiff
23 was “unable to work” is not explained by Dr. Curtis,⁴ nor is it supported by the

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25
26 ⁴The ALJ indicated, inconsistent with an opinion that Plaintiff was “unable
27 to work,” Dr. Curtis advised Plaintiff to become more active and to start physical
28 therapy. Tr. 26, 480.

1 doctor's objective examination findings.⁵ Dr. Curtis' report does not identify any
2 specific functional limitations or examination results which would support an
3 opinion that Plaintiff was not able to work. *See Johnson*, 60 F.3d at 1432-1433
4 (holding that the ALJ may disregard a physician's opinion when it is internally
5 inconsistent). Furthermore, as with Dr. Schneider, whether a claimant is "unable
6 to work" or disabled is a legal determination reserved for the ALJ, not a medical
7 professional. *Harman*, 211 F.3d at 1180.

8 Based on the foregoing, the Court finds the ALJ adequately discussed the
9 report of Dr. Curtis in this case. Tr. 26. Any error with respect to the ALJ's
10 failure to specifically address the weight accorded to Dr. Curtis' opinions would be
11 harmless. *Johnson*, 60 F.3d at 1436 n. 9; *Burch*, 400 F.3d at 679.

12 **D. Plaintiff's Symptom Testimony**

13 Plaintiff also challenges the ALJ's finding that Plaintiff was not entirely
14 credible, Tr. 27. ECF No. 12 at 15-20.

15 It is the province of the ALJ to make credibility determinations. *Andrews*,
16 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
17 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
18 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
19 testimony must be "specific, clear and convincing." *Lester*, 81 F.3d at 834.

20 "General findings are insufficient: rather the ALJ must identify what testimony is
21 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
22 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

23 ///

24 _____
25 ⁵Other than the general observation of Plaintiff sitting curled forward with
26 his head near his knees, then later in a flexed posture position and a finding of
27 tenderness in the right lateral belly, all physical examination results were noted by
28 Dr. Curtis as either "not painful" or "normal." Tr. 479.

1 In this case, the ALJ found Plaintiff's medically determinable impairments
2 could reasonably be expected to cause some of the alleged symptoms; however,
3 Plaintiff's statements concerning the intensity, persistence and limiting effects of
4 those symptoms were not entirely consistent with the medical and other evidence
5 of record. Tr. 25.

6 The ALJ first indicated Plaintiff's alleged disabling symptoms were not
7 supported by the objective medical evidence of record. Tr. 25-27. A lack of
8 supporting objective medical evidence is a factor which may be considered in
9 evaluating an individual's credibility, provided it is not the sole factor. *Bunnell v.*
10 *Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991) (Once a claimant produces objective
11 medical evidence of an underlying impairment, an adjudicator may not reject the
12 claimant's subjective complaints based solely on a lack of objective medical
13 evidence to fully corroborate the alleged severity of pain.); *Robbins v. Soc. Sec.*
14 *Admin.*, 466 F3d 880, 883 (9th Cir. 2006) (An ALJ may not make a negative
15 credibility finding "solely because" the claimant's symptom testimony "is not
16 substantiated affirmatively by objective medical evidence.").

17 As indicated by the ALJ, medical records from Gilbert Ong, M.D., dated just
18 prior to the alleged onset date, stated that the cause of Plaintiff's gastrointestinal
19 disorder was unclear, Tr. 346, and records just after the alleged onset date found
20 only moderate tenderness of the abdomen to the right upper back quadrant, without
21 any distension or masses, Tr. 370. Tr. 26. A July 2013 nuclear gastrointestinal
22 medicine study was normal, Tr. 415-416, and an abdominal exam performed on
23 August 24, 2013, was normal as well, Tr. 421-422. Tr. 26. Although Plaintiff
24 continued to seek treatment for abdominal issues, only some right upper quadrant
25 and periumbilical tenderness was detected in October 2013. Tr. 26, 448.

26 Moreover, as discussed above, on January 9, 2014, Dr. Schneider noted Plaintiff
27 performed a wide range of daily activities, Tr. 484-490, and, on October 30, 2014,
28 Dr. Curtis examined Plaintiff and, other than general observations of Plaintiff

1 exhibiting discomfort and a finding of tenderness in the right lateral belly, all
2 physical examination results were noted as either “not painful” or “normal,” Tr.
3 477-480. State agency reviewers, Wayne Hurley, M.D., and Gordon Hale, M.D.,
4 dated October 2013 and January 2014 respectively, opined Plaintiff could perform
5 a range of light work⁶ related tasks. Tr. 27, 90-91, 100-101.

6 The foregoing medical evidence demonstrates Plaintiff did not have greater
7 functional limitations as a result of his abdominal issues than as assessed by the
8 ALJ in the RFC determination.

9 The ALJ next indicated Plaintiff’s statements to medical providers suggested
10 symptom magnification and non-compliance with medical advice. Tr. 26. An
11 ALJ’s decision to discredit a claimant’s statements may be supported by a
12 claimant’s tendency to exaggerate, *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th
13 Cir. 2001), as well as a claimant’s noncompliance with medical care, *Fair v.*
14 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

15 On August 24, 2013, Plaintiff walked in to the Yakima Regional Medical
16 and Cardiac Center and reported he had just undergone an endoscopic retrograde
17 cholangiopancreatography (ERCP) in Seattle, had chronic pancreatitis, and had run
18 out of his pain medications (Dilaudid). Tr. 26, 421. However, as noted by the
19 ALJ, the ERCP showed, at most, mild, early pancreatitis, not chronic pancreatitis,
20 Tr. 295, and the abdominal examination performed on that same date, August 24,
21 2013, was normal, Tr. 422. Tr. 26. The Court agrees that the foregoing medical
22 evidence, coupled with the fact that Plaintiff had again run out of his pain

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25 ⁶Light level work involves lifting no more than 20 pounds at a time with
26 frequent lifting or carrying of objects weighing up to 10 pounds and requires a
27 good deal of walking or standing, or involves sitting most of the time with some
28 pushing and pulling of arm or leg controls. 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 medications early,⁷ suggests Plaintiff was engaged in symptom magnification and
2 not taking his medications as prescribed. The ALJ properly discounted Plaintiff's
3 credibility on the basis of symptom magnification and medical noncompliance.

4 The ALJ next held that Plaintiff's activities of daily living showed greater
5 functional abilities than as alleged by Plaintiff. Tr. 27. It is well-established that
6 the nature of daily activities may be considered when evaluating credibility. *Fair*,
7 885 F.2d at 603.

8 The ALJ noted that, in addition to completing personal care, household
9 chores and shopping, Tr. 275-277, Plaintiff occasionally worked for a friend
10 polishing/grinding metal parts as well as restoring antique trucks and/or repairing
11 race cars, Tr. 70-71. Tr. 27. Moreover, as previously indicated, Plaintiff reported
12 to Dr. Schneider that he performed leisure activities such as riding horses, riding
13 bulls, fishing, camping, going on drives, dancing and doing things with his
14 children. Tr. 488. While one does not need to be "utterly incapacitated" to be
15 disabled, *Fair*, 885 F.2d at 603, it was proper for the ALJ to find Plaintiff's
16 reported activities were inconsistent with his allegations of disability and thus
17 detracted from his overall credibility. *See Molina v. Astrue*, 674 F.3d 1104, 1113
18 (9th Cir. 2012) ("Even where [a claimant's daily] activities suggest some difficulty
19 functioning, they may be grounds for discrediting the claimant's testimony to the
20 extent that they contradict claims of a totally debilitating impairment.").

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23 ⁷The ALJ further stated Dr. Ong commented that while Plaintiff was
24 supposed to be taking Percocet in March 2013, he "ran out" and instead was taking
25 "some [D]ilaudid from his cousin which he states acts faster [and] longer than
26 Percocet," Tr. 347, and, in July 2013 and April 2014, Plaintiff became angry when
27 Henry Y. Kim, M.D., refused to prescribe narcotics, Tr. 482. Tr. 27. Dr. Kim
28 noted Plaintiff had a history of running out of prescription narcotics. Tr. 27, 482.

1 While the ALJ additionally mentioned Plaintiff's marijuana usage, which
2 made his providers reluctant about prescription opioids, Tr. 26, and Plaintiff's
3 suspended driver's license as a non-disability barrier to finding a job, Tr. 27, the
4 Court is not convinced these were factors the ALJ specifically weighed in
5 considering Plaintiff's symptom testimony. Given the ALJ's other supported
6 reasons for finding Plaintiff less than fully credible, the Court finds any error with
7 respect to these two accounts was harmless. *See Carmickle v. Comm'r, Soc. Sec.*
8 *Admin.*, 533 F.3d 1160, 1163 (9th Cir. 2008) (upholding adverse credibility finding
9 where ALJ provided four reasons to discredit claimant, two of which were invalid);
10 *Batson*, 359 F.3d at 1197 (affirming credibility finding where one of several
11 reasons was unsupported by the record); *Tommasetti*, 533 F.3d at 1038 (An error is
12 harmless when "it is clear from the record that the . . . error was inconsequential to
13 the ultimate nondisability determination.").

14 The ALJ is responsible for reviewing the evidence and resolving conflicts or
15 ambiguities in testimony. *Magallanes*, 881 F.2d at 751. It is the role of the trier of
16 fact, not this Court, to resolve conflicts in evidence. *Richardson v. Perales*, 402
17 U.S. 389, 400 (1971). The Court has a limited role in determining whether the
18 ALJ's decision is supported by substantial evidence and may not substitute its own
19 judgment for that of the ALJ even if it might justifiably have reached a different
20 result upon *de novo* review. 42 U.S.C. § 405(g). After reviewing the record, the
21 Court finds that the ALJ provided clear and convincing reasons, which are fully
22 supported by the record, for discounting Plaintiff's subjective complaints.
23 Accordingly, the ALJ did not err by finding Plaintiff's symptom allegations were
24 not entirely credible in this case.

25 CONCLUSION

26 Having reviewed the record and the ALJ's findings, the Court finds the
27 ALJ's decision is supported by substantial evidence and free of legal error.
28 Accordingly, **IT IS ORDERED:**

1 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
2 **GRANTED.**

3 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED.**

4 The District Court Executive is directed to file this Order and provide a copy
5 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
6 and the file shall be **CLOSED.**

7 DATED November 6, 2018.

A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE